No. 95-8736

Supreme Court, U.S.
FILED
NOV 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LARRY OSA OGBOMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

JOINT APPENDIX

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Petition For Certiorari Docketed April 25, 1996
Certiorari Granted October 1, 1996

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RELEVANT DOCKET ENTRIES

Date	Proceedings
10/19/93	Magistrate's Complaint Larry Osa Ogbomon
11/30/93	ARRAIGNMENT HELD before Magistrate Judge Joel M. Feldman. Case assigned to Judge Orinda D. Evans. PLEA OF NOT GUILTY.
1/18/93	ARRAIGNMENT on change of plea, held before Judge Orinda D. Evans as to Larry Osa Ogbomon (1) count(s)
	PLEA OF GUILTY by Larry Osa Ogbomon (1) count(s) 1. . . . sentence set 3:30 3/23/94 for Larry Osa Ogbomon
4/25/94	Sentencing of Larry Osa Ogbomon (1) count(s) 1.CNT 1: 16 MOS CBOP, FOLLOWED BY 36 MOS SPV'D RELEASE. $50.00 SPECIAL ASSESSMENT. Dfnt remanded to CUSM. Stnd. cond. of Spv'n as set forth in J/C
7/21/94	TRANSCRIPT filed as to defendant Larry Osa Ogbomon for dates of 04/20/94.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
V.	:	CRIMINAL INDICTMENT
Larry Osa Ogbomon, a/k/a Paul Edegba	:	No. 1:93-CR

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about the 21st day of October, 1993, in the Northern District of Georgia, the Defendant, Larry Osa Ogbomon, a/k/a Paul Edegba, an alien who had been previously arrested and deported from the United States pursuant to law, and who after such date had not received the consent of the Attorney General of the United States to reapply for admission to the United States, was found in the United States in the Northern District of Georgia, in violation of Title 8, United States Code, Section 1326.

/s/ Joe D. Whitley /by MB
JOE D. WHITLEY
UNITED STATES ATTORNEY

/s/ J. Dan Pelletier
J. DAN PELLETIER
SPECIAL ASSISTANT U.S. ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	DOCKET NO. 1:93-CR-493-ODE
VS.	)	
LARRY OGBOMON,	)	
DEFENDANT.	)	

SENTENCING HEARING - April 20, 1994

* * *

[2] (ATLANTA, FULTON COUNTY, GEORGIA, WEDNESDAY AFTERNOON APRIL 20, 1994, IN OPEN COURT.)

- - -

THE COURT: GOOD AFTERNOON.

COUNSEL: GOOD AFTERNOON.

THE COURT: LADIES AND GENTLEMEN, IN THE CASE OF UNITED STATES VERSUS OGBOMON, THIS IS THE SENTENCING HEARING. THERE ARE NO OBJECTIONS TO THE PRESENTENCE REPORT. MR. SPENCER, WOULD YOU LIKE TO BE HEARD?

MR. SPENCER: YES, YOUR HONOR. WE HAVE ONE - NOT OBJECTION, BUT CORRECTION FOR THE RECORD, JUDGE, AND IT GOES REALLY TOWARDS ATTITUDE, AND THAT'S WHY I WANTED TO MAKE IT.

PARAGRAPH 7, YOUR HONOR, IT SAYS IN THE ANONYMOUS LETTER THAT LED TO MR. OGBOMON'S ARREST, IT STATED SOMETHING ABOUT MR. OGBOMON CLAIMING THAT HE WAS GOING TO COMMIT BIGGER CRIMES TO GET BACK AT HIM BEING IN JAIL. WE ALWAYS DENIED THAT. WE WANTED TO LET THE COURT KNOW THAT, JUDGE, SO THE COURT COULD CONSIDER THAT FOR WHAT IT IS WORTH, BUT OTHER THAN THAT, WE DON'T HAVE ANY OBJECTIONS.

I THINK THE GOVERNMENT HAS A MOTION, SO I WILL SIT DOWN AT THIS TIME.

THE COURT: MR. PELLETIER?

MR. PELLETIER: AS I TOLD YOU AT THE PLEA, THE GOVERNMENT EXPECTED TO BE MAKING A 5K1 MOTION AT THE SENTENCING, AND WE WILL BE REQUESTING A TWO-LEVEL REDUCTION [3] BASED ON COOPERATION. THE INFORMATION HE GAVE THE GOVERNMENT DID RESULT IN THE ARREST OF ANOTHER INDIVIDUAL THAT WAS ILLEGALLY IN THE UNITED STATES. SO, AT THIS TIME THE GOVERNMENT WOULD MAKE A MOTION THAT THE COURT DEPART DOWNWARD TWO LEVELS TO REFLECT HIS COOPERATION.

MR. SPENCER: IN RESPONSE TO THAT, YOUR HONOR, WE WOULD JUST ASK THAT THE COURT CONSIDER THREE OR FOUR LEVELS, TWO OR THREE EXTRA LEVELS IN ADDITION TO – I MEAN ONE OR TWO ADDITIONAL LEVELS IN ADDITION TO THAT WHICH THE GOVERNMENT RECOMMENDED BECAUSE MR. OGBOMON APPARENTLY MADE SOME

FURTHER EFFORTS THAT JUST DID NOT CAUSE AN ARREST, BUT DID ATTEMPT TO ASSIST GOVERNMENT IN THIS MATTER.

THE COURT: I DON'T SEE THE DEPARTURE MATTER REFERENCED IN THE PLEA AGREEMENT.

MR. PELLETIER: YOUR HONOR, I BELIEVE WE DID MENTION THAT AT THE PLEA, AND IF MEMORY SERVES ME CORRECTLY, I HAND WROTE IT ON THE BOTTOM OF THE NEGOTIATED PLEA, AND ADVISED THE COURT THAT I EXPECTED TO BE MAKING THAT MOTION.

THE COURT: I DO NOT RECALL. I MEAN I CAN'T SIT HERE AND SAY I DON'T REMEMBER YOUR TELLING ME THAT, BUT I DON'T SEE IT IN THE PLEA AGREEMENT, HANDWRITTEN OR OTHERWISE.

MR. SPENCER: I SEEM TO REMEMBER, YOUR HONOR, THAT MR. PELLETIER AND I, I THINK, HAVE HAD THREE OF THESE CASES, AND I DO REMEMBER THIS BEING THE CASE WHERE THERE WAS AN ISSUE ABOUT THE DEPARTURE, AND TO NOT DELAY THE PROCEEDINGS, [4] MR. PELLETIER AT THE TIME WAS TO WRITE IN THE PLEA AGREEMENT THAT HE EXPECTED A 5K1 MOTION TO BE MADE IN THIS MATTER, AND THAT WAS PART OF OUR UNDERSTANDING.

MR. PELLETIER: THAT WAS DONE IN OPEN COURT, AND I DON'T KNOW IF YOU HAVE THE ACTUAL COPY THAT WE FILED AT THE TIME.

THE CLERK: I HAVE GOT THE ORIGINAL. THAT WOULD HAVE BEEN THE COPY THAT HE PROVIDED, BUT NOT THE ORIGINAL.

THE COURT: WELL, I DON'T HAVE IT. MY CLERK HAS JUST HANDED ME THE COPY THAT IS IN THE FILE THAT IS IN THE COURTROOM.

NOW, IF BOTH COUNSEL ARE TELLING ME AS OFFICERS OF THIS COURT THAT YOU SPECIFICALLY REMEMBER THIS BEING BROUGHT UP, I'LL RELY ON WHAT YOU ARE TELLING ME, BUT IF THERE IS SOME AMBIGUITY ABOUT THIS, I WANT TO CHECK.

MR. PELLETIER: IF I CAN HAVE JUST A MOMENT TO CONFER.

THE COURT: WE CAN TAKE A SHORT RECESS. THIS WOULD BE VERY QUICK TO RUN THIS MATTER DOWN.

MR. PELLETIER: ALL RIGHT.

MR. SPENCER: THAT'S FINE.

MR. PELLETIER: IF WE CAN TAKE ABOUT FIVE MINUTES.

THE COURT: LET'S DO THAT.

(RECESS TAKEN)

THE COURT: OKAY. LADIES AND GENTLEMEN, THE [5] TRANSCRIPT OF THE PLEA HEARING INDICATES THE SUBJECT OF THE DEPARTURE WAS DISCUSSED AT THAT TIME. COUNSEL SAID YOU ANTICIPATED THERE WOULD BE A MOTION, AND I DIRECTED YOU TO PUT IT IN THE WRITTEN PLEA

AGREEMENT. APPARENTLY IT WAS PUT ON THE ORIGINAL OF THE PLEA AGREEMENT, BUT DID NOT MAKE IT TO ANY OF THE COPIES.

ANYTHING FURTHER ON THE MOTION FOR A DEPARTURE?

MR. SPENCER: NOTHING, YOUR HONOR.

THE COURT: I'LL GRANT THE MOTION, AND IT WILL BE A TWO-LEVEL DEPARTURE.

ANYTHING FURTHER CONCERNING THE SENTENCE?

MR. SPENCER: ONLY THAT AS PART OF THE PLEA AGREEMENT, YOUR HONOR, THE GOVERNMENT WOULD RECOMMEND THE LOWER END OF THE GUIDELINE FOR A SENTENCE, AND WE THINK THAT IS THE APPROPRIATE SENTENCE IN THIS MATTER.

THE COURT: IS THAT YOUR RECOMMENDATION?

MR. PELLETIER: THAT'S CORRECT, YOUR HONOR, AND THAT WAS PART OF THE PLEA AGREEMENT. I THINK IT WAS A BARGAINED FOR EXCHANGE.

THE COURT: MR. OGBOMON, WOULD YOU COME ON UP TO THE PODIUM, PLEASE? WOULD YOU LIKE TO MAKE A STATEMENT?

THE DEFENDANT: YES, MA'AM. YOUR HONOR, DESPITE SUFFERING AND HARD TIMES AND GOING THROUGH A CRISIS AND LOSING THAT

SENT ME HOME, AND I GO BACK TO NIGERIA, AND FOR THAT TO COME BY IS LIKE FINDING A REASON FOR FINDING JUSTIFICATION [6] FOR, BUT I NOW HAVE HAD ENOUGH, AND I SUFFER GREATLY FOR BEING IN JAIL, AND I WANT YOU TO CONSIDER AND GIVE ME WHAT YOU NEED TO DO, AND I GO BACK AND BE MORE PRODUCTIVE AND TRY TO TURN AROUND, AND I PROMISE I WON'T COME BACK AGAIN, SO YOU WON'T HAVE TO SEE ME. THANK YOU.

THE COURT: ANYTHING FURTHER, COUNSEL?

MR. PELLETIER: NOTHING FROM THE GOVERNMENT.

THE COURT: MR. OGBOMON, YOU ARE HEREBY COMMITTED TO THE CUSTODY OF THE BUREAU OF PRISONS FOR A PERIOD OF 16 MONTHS. IT IS ORDERED THAT YOU PAY THE UNITED STATES A SPECIAL ASSESSMENT OF $50.

ON RELEASE FROM IMPRISONMENT, YOU SHALL BE PLACED ON SUPERVISED RELEASE FOR A PERIOD OF THREE YEARS.

WITHIN 72 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, YOU SHALL REPORT IN PERSON TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH YOU ARE RELEASED. WHILE ON SUPERVISED RELEASE YOU SHALL NOT COMMIT ANOTHER FEDERAL, STATE, OR LOCAL CRIME. YOU SHALL COMPLY WITH THE STANDARD CONDITIONS THAT HAVE BEEN ADOPTED BY THIS

COURT, AND YOU SHALL COMPLY WITH THE FOLLOWING ADDITIONAL CONDITIONS:

FIRST, YOU SHALL PAY THE SPECIAL ASSESSMENT IMPOSED BY THIS JUDGMENT THAT REMAINS UNPAID AT THE COMMENCEMENT OF THE PERIOD OF SUPERVISED RELEASE.

SECONDLY, ON COMPLETION OF THE IMPRISONMENT PORTION OF YOUR SENTENCE, YOU SHALL BE DEPORTED FROM THE UNITED STATES [7] PURSUANT TO 18 UNITED STATES CODE, SECTION 3583(D). YOU SHALL TAKE NO ACTION TO RESIST AN ORDER OF DEPORTATION. YOU SHALL NOT RETURN TO THE UNITED STATES DURING THE PERIOD OF SUPERVISED RELEASE. YOU SHALL BE DETAINED IN THE CUSTODY OF THE IMMIGRATION AND NATURALIZATION SERVICE PENDING YOUR DEPORTATION FROM THE UNITED STATES.

ANY EXCEPTIONS?

MR. SPENCER: WE OBJECT TO THE COURT'S IMPOSITION OF DEPORTATION.

THE COURT: ANYTHING FURTHER?

MR. PELLETIER: NO.

THE COURT: THAT'S ALL. THANK YOU.

- - -

(PROCEEDINGS CONCLUDED.)

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA	:	Case Number: 1:93-CR-493-01-ODE
v.	:	
LARRY OGBOMON	:	
Defendant.	:	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, LARRY OGBOMON, was represented by Gary Spencer.

The defendant pled guilty to count(s) one. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
8 USC 1326	Unlawfully Entering or Remaining in the United States	One

As pronounced on April 20, 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) one, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days

of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 25 day of April, 1994.

/s/ Orinda D. Evans,
United States
District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SIXTEEN (16) MONTHS.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to

_____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy U. S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall depart the United States when ordered to do so by the Immigration and Naturalization Service. The defendant shall take no action to appeal or resist any order if deportation by the Immigration and Naturalization Service and if deported, shall not reenter the United States during the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8606
Non-Argument Calendar

D. C. Docket No. 1:93-cr-493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY OSA OGBOMON
a/k/a Paul Egegra,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(May 5, 1995)

Before KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

Appellant pled guilty of violating 8 U.S.C § 1326, reentering the United States after being deported. The district court sentenced appellant to 16 months incarceration, followed by a three-year term of supervised release. As a condition of supervised release, the district court ordered appellant deported from the United States and detained by the Immigration Service until deported. Appellant urges that the district court lacked authority to order his deportation without affording him recourse to

the procedures under the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.*[1]

In *United States v. Chukwura*, 5 F.3d 1420, 1423-24 (11th Cir. 1993), *cert. denied*, 115 S.Ct. 102 (1994), we held that the district court could order deportation as a condition of supervised release without recourse through the procedures for an administrative hearing and judicial review under the INA. Pointing to First Circuit authority which apparently held contra, *United States v. Sanchez*, 923 F.2d 236, 237 (1st Cir. 1991), both appellant and appellee now urge that *Chukwura* was wrongly decided. However, we are not free to overrule *Chukwura*. Only a decision by this court sitting en banc or by the United States Supreme Court can overrule a prior panel decision. *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir. 1986). Therefore, we affirm appellant's sentence. The parties, however, are free to petition for rehearing en banc. *See* Fed.R.App.P. 35 and 40.

AFFIRMED.

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[1] Appellant also argues that the district court erred in failing to make findings of fact regarding his deportability, and failing to consider the possibility of suspension of deportation. However, as appellant did not raise these issues before the district court, he has failed to preserve them for review. *United States v. Prichett*, 898 F.2d 130, 131 (11th Cir. 1990).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8606

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY OSA OGBOMON
a/k/a/ Paul Egegra,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

(✓) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit

Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court of the United States

No. 95-8736

Larry Osa Ogbomon,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 12, 1996. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 10, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 27, 1996. Rule 29.2 does not apply.

October 1, 1996
